Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Developing a Unified Intercarrier	)	CC Docket No. 01-92
Compensation Regime	)	
	)	

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

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INTERNATIONAL INC.

October 18, 2002

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Qwest Communications International Inc. ("Qwest") hereby respectfully files comments pursuant to the *Public Notice* of the Federal Communications Commission ("Commission") seeking comment on two petitions for declaratory ruling ("petitions") regarding access charges and intercarrier compensation for wireless traffic.[1]

I. INTRODUCTION AND SUMMARY

The CMRS Petition and US LEC Petition raise two related issues regarding access charges and intercarrier compensation for traffic originating or terminating on the network of a commercial mobile radio services ("CMRS") provider—in one case, compensation for the termination of CMRS traffic by an incumbent local exchange carrier ("ILEC"), in the other, compensation for the transit of traffic between an interexchange carrier ("IXC") and a CMRS provider. The filing of these two petitions, which are the latest in a series of such requests, reveals the continuing need for the Commission to adopt a comprehensive, unified scheme for intercarrier compensation to replace the Commission's current hodgepodge of intercarrier

[1] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Public Notice* (rel. Sept. 30, 2002); Petition for Declaratory Ruling of T-Mobile USA, Inc., *et al*. (filed Sept. 6, 2002) ("CMRS Petition"); Petition of US LEC Corp. for Declaratory Ruling Regarding LEC Access Charges for CMRS Traffic (filed Sept. 18, 2002) ("US LEC Petition").

compensation rules. As Qwest has explained in previous filings in this docket, the most promising approach to intercarrier compensation is the adoption of a comprehensive bill-and-keep system, such as Qwest's bill-and-keep "at the edge" proposal.

Given the steady stream of difficult issues that continue to arise under the current rules, the Commission should move quickly to adopt a unified bill-and-keep regime. In the meantime, however, the Commission should clarify two important issues regarding compensation for the exchange of traffic with CMRS providers. First, it is not appropriate for rural ILECs, or any other carriers, to establish unilateral reciprocal compensation rates for the termination of CMRS traffic via state tariffs. Intercarrier compensation for the exchange of local traffic is to be governed by contract, not tariff, and efforts by ILECs to bypass the contracting provisions of Sections 251 and 252 of the Communications Act by "tariffing" functions that should be dealt with via reciprocal compensation arrangements should be declared to be unlawful. Second, the Commission should confirm the rights and responsibilities of LECs transporting traffic between CMRS providers and IXCs. While LECs generally are entitled to access charges from IXCs for carrying interexchange traffic between CMRS providers and IXCs, multiple LECs cannot insert themselves in the access paths and automatically declare themselves entitled to compensation over the objection of an IXC. There is an insufficient factual record to determine that US LEC is entitled to compensation in this instance. As a result, the Commission must deny the US LEC petition for declaratory ruling.

II. THE PETITIONS ILLUSTRATE THE URGENT NEED TO ADOPT A COMPREHENSIVE BILL-AND-KEEP REGIME

In the *Intercarrier Compensation NPRM*, the Commission acknowledged the need to adopt a unified intercarrier compensation regime to resolve certain fundamental problems in the Commission's current rules, and suggested that bill-and-keep offered the best hope in this

respect.[2] On the same date, the Commission implemented temporary fixes for two of the most pressing intercarrier compensation issues—regulatory arbitrage due to inefficient reciprocal compensation rates for traffic destined for Internet service providers ("ISPs") and supra-competitive access charges imposed on IXCs by competitive local exchange carriers ("CLECs"). Since that time, the Commission has been asked to resolve a series of complex intercarrier compensation disputes, of which the CMRS Petition and US LEC Petition are the most recent. These petitions dramatically illustrate that there is still an urgent need for the Commission expeditiously to adopt a unified intercarrier compensation regime.

In the CMRS Petition, the petitioners complain that certain rural ILECs have unilaterally adopted tariffs establishing "wireless termination rates" that are much higher than typical reciprocal compensation rates. This situation points out at least three problems with the current system, each of which could be avoided by adoption of Qwest's bill-and-keep "at the edge" proposal.

First, the CMRS Petitioners apparently exchange such a small amount of traffic with many rural ILECs that it may not be efficient for the rural ILEC and CMRS provider to negotiate individual interconnection agreements, or possibly even to bill each other for the exchange of traffic. In fact, the CMRS Petitioners assert that, for this reason, they had assumed that an implicit bill-and-keep arrangement was in place for the exchange of traffic with the rural ILECs. Taking a different tack, some rural ILECs have filed "wireless termination" tariffs, in lieu of individual interconnection negotiations.

Adoption of Qwest's bill-and-keep proposal would avoid the need for interconnection negotiations between carriers exchanging relatively small amounts of traffic, such as CMRS

[2] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-

providers and rural ILECs. Under Qwest's default rules, all non-transit telecommunications traffic that uses the public switched telephone network, including traffic exchanged by CMRS providers and rural ILECs, would be exchanged on a bill-and-keep basis, with each carrier responsible for delivering traffic, either directly or through another carrier, to the "edge" of the other carrier's network. As a result, there generally would be no need for such carriers to negotiate intercarrier compensation arrangements with carriers that do not directly interconnect with them if the Qwest proposal were adopted.[3]

Second, the CMRS petitioners contend that the rural ILECs have unilaterally established supra-competitive "wireless termination" rates via tariff. As the Commission has found in the context of exchange access services provided by CLECs, a terminating carrier has an obvious incentive to charge interconnecting carriers rates that exceed compensatory levels. Moreover, because the terminating carrier typically controls the only switch and only line leading to the called party's number (and thus enjoys a so-called "terminating access monopoly" for calls placed to that party), it often has not just the incentive, but also the ability, to charge extra-compensatory rates to the other carriers, unless regulators step in to cap the rates. Furthermore, although the called party has chosen the rural ILEC as its local provider, the called party does not pay that provider's reciprocal compensation charges. Instead, under the theory proposed by the small ILECs, those charges would be paid by the calling party's CMRS provider, which has little

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92, *Notice of Proposed Rulemaking*, 16 FCC Rcd. 9610, 9612-13 ¶ 4, 9616-18 ¶¶ 11-18 (2001).

[3] This example also reveals one of the advantages to the bill-and-keep "at the edge" proposal, as compared to a default rule that would split the cost of "transport" between the originating and terminating carriers' networks. Under a default rule of the latter type, the carriers might have to negotiate the details of the transport (*e.g.*, the means of exchanging the traffic), no matter how small the amount of traffic involved.

or no means of affecting the called party's choice of provider and thus cannot avoid extra-compensatory reciprocal compensation charges.

In contrast, bill-and-keep would require a rural ILEC to recover from its end users any costs of terminating calls received from CMRS providers (or any other type of carrier). Under a unified bill-and-keep regime, all providers of local services—whether wireline or wireless—would recover these costs only from their own end users. Consequently, to the extent a particular provider tries to charge above-market rates for these services, its end users would be incented to switch to a provider that charges lower rates. In this way, a unified bill-and-keep regime would allow competition to place downward pressure on rates, which cannot occur under the current calling party's network pays ("CPNP") regime.

Third, the current hodgepodge of intercarrier compensation rules may provide incentives for carriers to characterize traffic as a certain type or to route it through a certain type of carrier to obtain the most favorable intercarrier compensation treatment.[4] In the CMRS Petition, the petitioners claim (at 5 n.12) that rural ILECs "typically route intraMTA, even intraLATA traffic, land-to-mobile traffic bound for the CMRS providers *via* an IXC and will not affirm their reciprocal compensation obligations (*emphasis in original*)." Regardless of the accuracy of this statement, it points out the type of incentives inherent in the Commission's current rules that have led to repeated requests for the Commission to intervene in intercarrier compensation disputes.

[4] *See Intercarrier Compensation NPRM*, 16 FCC Rcd. at 9616 ¶¶ 11-12. For example, in theory, a LEC might require 1+ dialing for what should be a local call, which would cause the call to be routed to the presubscribed IXC of the calling party. Qwest has no knowledge as to whether any LEC in fact forces its end-user customers to dial 1+ on what should be classified as local calls to their end users based on the rating of the NPA-NXX of the called party.

Under current rules, intraMTA calls which cross exchange boundaries from a landline carrier to a CMRS provider (that are not carried by an IXC) are subject to reciprocal compensation, rather than access charges. Thus, in such circumstances, the originating landline carrier is required to pay the CMRS provider reciprocal compensation for terminating the call, and most likely transiting charges to a large ILEC or other carrier through whose tandem the call is completed.[5] However, a rule that is more favorable to the landline carrier applies if the call is carried by an IXC. In that case, the originating carrier not only avoids a requirement to pay reciprocal compensation and transiting charges, but also gains the right to collect access charges from the IXC.[6] Clearly, there is no logic to a rule that results in such disparate compensation obligations, solely on the basis of whether a call is carried by an IXC or LEC.[7]

The adoption of Qwest's bill-and-keep "at the edge" proposal would eliminate such asymmetries and thereby greatly reduce incentives for arbitrage. Under such a regime, the same intercarrier compensation rules would apply to the exchange of all traffic, regardless whether the traffic terminates at a wireline or wireless phone, and whether the call is carried by an IXC. In this way, a unified bill-and-keep regime would be technology-neutral and would not favor carriers handing off particular types of traffic. Bill-and-keep thus would permit carriers to

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[5] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, *First Report and Order*, 11 FCC Rcd. 15499, 15997 ¶ 1008 (1996) ("*Local Competition First Report and Order*").

[6] *Id.*, 11 FCC Rcd. at 15594 ¶ 184, 15598-99 ¶¶ 190-91, 15808-09 ¶¶ 610-11. In such cases, the transit provider recovers the cost of its transit services in the form of access charges from the IXC. *See infra* Section IV. We note that local traffic should be subject to reciprocal compensation rules. Current technology can be manipulated to make local traffic look like long distance traffic.

[7] This is further complicated by the fact that a wireline to CMRS call may be "local" for purposes of intercarrier compensation, but "toll" with regard to end-user charges.

compete solely on their economic and technological merits, rather than based on advantages conferred by regulation. For all these reasons, the Commission should move expeditiously to adopt a comprehensive bill-and-keep framework.

III. THE RURAL ILECS' "WIRELESS TERMINATION" TARIFFS ARE NOT CONSISTENT WITH THE COMMUNICATIONS ACT OR THE COMMISSION'S RULES

In the CMRS Petition, the petitioners request the Commission to declare that rural ILECs' wireless termination tariffs are unlawful and that ILECs do not engage in good faith negotiations by unilaterally filing such tariffs. In support, the CMRS Petitioners rely on a series of pre-1996 Act orders regarding CMRS-ILEC interconnection and the requirements imposed on ILECs by section 251(b) and (c). The orders cited by the CMRS Petitioners generally conclude that an ILEC fails to engage in good faith negotiations if it unilaterally files a tariff specifying reciprocal compensation charges to wireless carriers prior to negotiating interconnection agreements with the wireless carriers.[8] The CMRS Petitioners are correct in their argument that an ILEC cannot bypass its reciprocal compensation obligations by filing a tariff with either the FCC or with the state regulator. If an ILEC seeks to collect reciprocal compensation from a CMRS provider, it must do so through an interconnection agreement, not a tariff.[9]

Nevertheless, the CMRS Petition claims that many LECs and CMRS providers exchange such small amounts of traffic that it is not worth the expenditure of resources to negotiate individual compensation agreements. In such situations, the most reasonable manner of cost recovery is bill-and-keep compensation. Qwest has explained at length in this docket that bill-

[8] *See* CMRS Petition at 8, 9 (citing *Second Radio Common Carrier Order*, 2 FCC Rcd. 2910, 2916 ¶ 56 (1987); *Third Radio Common Carrier Order*, 4 FCC Rcd. 2369, 2370-71 ¶¶ 13-14 (1989)).

[9] *Local Competition First Report and Order*, 11 FCC Rcd. at 16018 ¶ 1045.

and-keep is a superior economic method for cost recovery and should be adopted on a unified basis. In fact, it may be that bill-and-keep represents the best negotiated outcome even under the current rules, when only a small amount of traffic is exchanged between carriers. As a result, the Commission should establish that, in the absence of an intercarrier compensation agreement, bill-and-keep will apply for traffic exchanged between LECs and CMRS providers.

IV. THE US LEC PETITION DOES NOT PRESENT A SUFFICIENTLY DEVELOPED FACTUAL RECORD ON WHICH A DECLARATORY RULING CAN BE ISSUED

US LEC asks the Commission to "reaffirm that LECs are entitled to recover from IXCs access charges for traffic that they transport from a CMRS provider to the IXC (and vice versa)."[10] On its face, this statement appears to be consistent with the law concerning the ability of LECs (ILECs and CLECs) to recover the costs of provisioning jointly provided access. However, there is a substantial factual ambiguity in the US LEC Petition regarding exactly what functions it is performing on behalf of IXCs for which it desires to be compensated. Namely, it appears possible, based on documentation filed at the FCC and elsewhere, that US LEC is actually performing duplicate functions as a transiting carrier between an ILEC and a CMRS provider. If such is the case, US LEC's legal position is very tenuous, and its right to collect access charges from an IXC under such circumstances would be questionable at best. The Commission should be very cautious before establishing the right of a transiting carrier with no legal relationship (actual or constructive) with an IXC to bill that carrier for unwanted and unnecessary functions under the guise of providing an access service. In all events, the possibility that there is more behind the US LEC Petition than meets the eye should cause the Commission to insist on a firm factual foundation before any declaratory ruling is issued.

[10] US LEC Petition at 10.

A. The Factual Basis of the US LEC Petition Is Not Sufficiently Clear to Warrant Declaratory Relief

A declaratory ruling under Section 1.2 of the Commission's rules is appropriate only when the facts of the case are clearly developed and essentially undisputed.[11] Here the factual premise of the US LEC Petition is neither clearly developed nor undisputed.

US LEC asserts (p. 9) that it is a certificated CLEC offering interstate access services via duly filed federal tariffs. It contends (p. 3) that its tariffed rates are consistent with the benchmark guidelines for CLEC access tariffs and that it has (*id*.), at least until recently, routinely been paid for access services by IXCs. US LEC further posits (p. 2) that CMRS providers "rely on the facilities of LECs to connect to the IXC," and that (*id*.) US LEC is "performing the traditional role of a local exchange provider in providing access service to the IXC such that the call from the CMRS switch to the IXC travels over its facilities." US LEC further posits (*id*.) that "[t]here is no dispute that if the call originated or terminated on a landline that an IXC would pay US LEC the requisite access charges[,]" and that (p. 3) it has routinely billed and collected access charges from IXCs for the CMRS traffic it carries without dispute in the past.

However, there are several key details of US LEC's service and configuration that are less than clear from the US LEC filing. First, US LEC never alleges that any IXC actually ordered service from it, a curious omission, especially as US LEC likewise never describes in any detail what service it provides on behalf of either the IXC it hopes to bill, the CMRS providers which it purports to serve, or any other carrier involved in providing access service to

[11] *See In the Matter of American Network, Inc*. *Petition for Declaratory Ruling Concerning Backbilling of Access Charges*, *Memorandum Opinion and Order*, 4 FCC Rcd. 550, 551 ¶ 18 (1989). The Commission can seek to supplement a declaratory ruling record through discovery,

the end-user customer of the CMRS providers. These ambiguities in US LEC's Petition lend at least some credence to the factual allegations in two complaints filed against US LEC in which it is alleged that US LEC is, at least in some cases, acting as a second transiting carrier operating between a CMRS provider and another LEC in the origination and termination of interstate access.[12] The allegation is further made that US LEC is providing no functionality to the IXC, other than perhaps duplicating the tandem switching of the ILEC from whom the IXC has ordered access service. There is no legal relationship, either by contract or rule, that would require an IXC to pay US LEC for services under these circumstances.

Two documents suggest that, at least in some of the situations for which US LEC seems to be seeking relief in its Petition, it is not entitled to payment from an IXC whose traffic may transit US LEC's network. The first such document is an informal complaint lodged against US LEC by ITC^DeltaCom Communications, Inc. on September 23, 2002.[13] In this complaint, ITC^DeltaCom alleges that US LEC has, in the case of toll free calls delivered from the customers of CMRS carriers to ITC^DeltaCom, inserted itself between an ILEC and the CMRS carrier and sought to collect money from ITC^DeltaCom for services it neither ordered nor desired. According to the informal complaint, US LEC's own tariff does not permit assessment of such charges on ITC^DeltaCom, and US LEC has been suppressing the calling party number of the call to make it appear that the calling party is US LEC's customer, not the customer of the CMRS provider.

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but a declaratory ruling proceeding is not a proper procedural vehicle for resolving contested factual issues.

[12] *See infra* Section V.

[13] Attached hereto as Exhibit A (electronic version).

ITC^DeltaCom has also filed (on September 20, 2002) a complaint against US LEC in the United States District Court for the Northern District of Georgia (Newnan Division) alleging that the same conduct violates federal and state racketeering laws, the Georgia Deceptive Practices Act and constitutes common law fraud.[14]

Qwest draws no conclusions as to the truth of the allegations in these documents, as US LEC has not yet responded in either proceeding. The existence of these two actions, however, raises the very real possibility that the Commission, should it issue a declaratory ruling on the basis of the US LEC Petition, would do so on an incomplete factual record.

B. If US LEC Is Performing Transiting Functions Not Recognized in the Commission's Rules and Policies As Warranting Payment by an IXC, US LEC Is Not Entitled to Any Payment in the Absence of an Agreement with an IXC

The Commission's rules and policies recognize that a number of relationships among carriers are necessary and in the public interest, and expects that proper payments will be made among carriers for services actually performed in exchanging traffic on behalf of other carriers. These rules do not, however, provide a mechanism whereby a carrier may perform unnecessary and unasked-for services or functions on behalf of another carrier and obtain payment for its voluntary actions.

Two carriers combine to provide exchange access to an IXC in a variety of circumstances recognized by the FCC:

- Where two LECs jointly provide access to an IXC, the service is provided under the tariffs of each carrier. These tariffs are tailored in

[14] Attached hereto as Exhibit B (electronic version).

such a way that the IXC ordering access service is charged only for the service it actually needs and uses, and are subject to FCC regulation.[15]

- Where a LEC and a CMRS provider jointly provide access services to an IXC (access to the customer of the CMRS provider), the LEC's access service is tariffed and paid for by the IXC. Services provided by the CMRS provider are not tariffed. A CMRS provider seeking compensation from an IXC under these circumstances must have an established legal relationship (generally pursuant to contract).[16]
- However, the Commission has not established any rules or principles to govern a situation where a LEC interposes itself between an ILEC and a CMRS provider and claims, without anything more, to have the right to collect money from the IXC.
- In a jointly provided access scenario among LECs, each carrier is providing a necessary functionality to the IXC, and charges are covered by the carriers' tariffs (or, in the case of CLECs choosing to enter into contracts with IXCs, the pertinent contract documents). However, even here the Commission has yet to establish detailed rules governing how to prevent an IXC from being billed for unnecessary and unwanted functionality by a third LEC that has interposed itself into the access process without the consent of the IXC.

[15] *See Access Billing Requirements for Joint Service Provision*, 65 Rad. Reg. 2d (P&F) 650 (Common Carrier Bureau 1988); 47 C.F.R. § 69.5(b).

We submit that in those circumstances where a LEC claiming to be providing an access service does not have a business relationship with an IXC, it can collect for its share of "jointly provided access" only in those cases where the Commission's rules have made it clear that the LEC is actually entitled to provide the service and receive compensation therefor. This principle is consistent with the Commission's *Sprint Declaratory Ruling*,[17] in which the Commission rejected an effort by CMRS providers to bill IXCs for access that they had not ordered.[18] It is also consistent with the general principle that a tariff that seeks to charge for service that has not been ordered is patently unreasonable in the absence of either a rule to the contrary or some other evidence of a "constructive" legal relationship between two carriers.[19]

In this case the Commission should not attempt to make any decision on US LEC's right to be considered a provider of jointly provided access in the absence of a fully developed record. US LEC's assertion that, simply because it has filed a tariff, it is entitled to receive compensation from an IXC that might not even know it exists must be rejected. Jointly provided interstate access must be governed by laws and rules that protect IXCs against unnecessary charges,

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[16] *In the Matter of Petitions of Sprint PCS and AT&T Corp. For Declaratory Ruling Regarding CMRS Access Charges*, WT Docket No. 01-316, *Declaratory Ruling*, 17 FCC Rcd. 13192 at ¶¶ 8-12 (2002) ("*Sprint Declaratory Ruling*").

[17] *Id*., 17 FCC Rcd. 13192 at ¶ 8.

[18] The Commission has held that a tariff that seeks to bill another carrier for services that the second carrier has not ordered and does not desire to purchase is patently unreasonable and unlawful. *See In the Matter of Capital Network Systems, Inc*., *Memorandum Opinion and Order*, 6 FCC Rcd. 5609 (Common Carrier Bureau, Sept. 10, 1991), *aff'd*, 7 FCC Rcd. 8092 (1992), *aff'd sub nom. Capital Network System, Inc. v. FCC*, 28 F.3d 201 (D.C. Cir. 1994). The fact that US LEC had filed a patently unlawful tariff for service would be of no consequence. The patent invalidity of a tariff is a defense to an action to collect under a tariff. Any IXC choosing to decline to pay an unlawful charge to US LEC would have a valid defense to any action to collect that amount. *See Reiter v. Cooper*, 507 U.S. 258 (1993).

[19] *Id.*

especially in cases where the IXCs have no knowledge of the carrier seeking to impose the charge.[20]

V. THE FCC MUST CONTINUE TO RECOGNIZE THAT UNIQUE ISSUES ARE RAISED BY TRANSITING CARRIERS REQUIRING CAREFUL CONSIDERATION PENDING IMPLEMENTATION OF A UNIFIED INTERCARRIER COMPENSATION STRUCTURE

The issues raised in these two petitions point to a recurring issue that is likely to become more pronounced in the future without comprehensive treatment in the intercarrier compensation docket: transiting carriers do not fit neatly into the existing intercarrier compensation rules and their unique status must be recognized. A transiting carrier operates as an additional carrier providing service between two other carriers. In the traditional access model, a LEC provides the access connection between the IXC and its end user. In the case of small rural ILECs, CLECs and CMRS providers, large ILECs typically provide tandem switching and transport between those networks and IXCs' networks. In addition, large ILECs provide interconnection as a transiting carrier for the exchange of local traffic among CLECs, small ILECs and CMRS providers. As the instant petitions and various other efforts by the Commission to address transiting issues demonstrate, carriers providing transiting services must be recognized as providing unique services that require specific and unique treatment under the Act.

Qwest submits that an effort to deal with transiting issues must be based on recognition of several vital principles:

- Transiting carriers are not providers of local exchange services under the Act. Accordingly, no carrier has a Section 251(b) or (c) right to interconnect with a transiting carrier.

[20] *See* note 18, *supra*.

- Transiting carriers are not required to pay reciprocal compensation for termination of another carrier's traffic. The principles established by the Commission in its *Texcom decision*[21] were correct.
- Transiting carriers are entitled to charge both originating carriers and terminating carriers for transiting service, subject to the proviso that efforts to "double collect" would constitute an unreasonable practice under the Act.

VI. CONCLUSION

The CMRS Petition and US LEC Petition dramatically illustrate the ongoing conflicts and problems arising under the Commission's current intercarrier compensation rules, each of which would be greatly mitigated, if not solved, by Qwest's bill-and-keep "at the edge" proposal. Given the disruptive effect of these conflicts, the Commission should adopt a unified bill-and-keep regime as soon as possible. In the meantime, the Commission should address certain key

[21] *Texcom, Inc., d/b/a Answer Indiana, Complainant, v. Bell Atlantic Corp., d/b/a Verizon Communications, Defendant.*, File No. EB-00-MD-14, *Memorandum Opinion and Order*, 16 FCC Rcd. 21493 (2001).

issues raised by the CMRS and US LEC Petitions. In addition, given the incomplete and conflicting factual record, the Commission must deny US LEC's petition for declaratory ruling.

Respectfully submitted,

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October 18, 2002

EXHIBIT A

September 23, 2002

VIA HAND DELIVERY

Ms. Faye Jeter-Bragg
Market Disputes Resolution Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: ITC^DeltaCom Communications, Inc. Informal Complaint Against US LEC Corp. et al.

Dear Ms. Jeter-Bragg:

ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom"), through its attorneys, and pursuant to section 1.716 of the Federal Communications Commission's ("Commission") rules, 47 C.F.R. § 1.716, submits this informal complaint against US LEC Corp.; US LEC of Alabama, Inc.; US LEC of Florida, Inc.; US LEC of Georgia, Inc.; US LEC of Louisiana, Inc.; US LEC of North Carolina, Inc.; and US LEC of Tennessee, Inc. (collectively, "US LEC") due to US LEC's unlawful billing of access charges to ITC^DeltaCom.

ITC^DeltaCom provides local and long distance services, including toll free services (*e.g.*, 800, 888), throughout the Southeastern United States. To reach one of ITC^DeltaCom's toll free subscribers, the calling party originates the telephone call by dialing the toll free number. In cases where the calling party is served by a wireless carrier, the wireless carrier hands-off the call to the incumbent local exchange carrier ("ILEC"), and the ILEC assesses a termination charge on the wireless carrier. The ILEC then transports the call to ITC^DeltaCom and imposes an FCC-tariffed interstate access charge on ITC^DeltaCom in the form of a modest tandem fee. ITC^DeltaCom then terminates the call with its 800 or 888 customer. In this scenario, the originating wireless carrier does not impose an interstate access charge on ITC^DeltaCom.

Beginning as early as August 2000, US LEC implemented an alternate scheme whereby it insinuated itself between the wireless carrier and the toll free service customer by having the wireless carrier transmit the call to US LEC. US LEC then retransmits the call to the incumbent LEC, which maintains interconnection trunks with ITC^DeltaCom, and the call continues as it would have without the intervention of US LEC. US LEC adds nothing to the process of completing the call. In fact, US LEC deletes the calling party information apparently so that it can improperly present itself as the local exchange carrier whereas the incumbent LEC would otherwise transmit this information and correctly identify the calling party. The result of stripping this information is that it removes the ability for the toll free service customer to identify the true origin of the call. It is important to recognize that:

- The wireless carrier originates the call.
- US LEC is not the local exchange carrier for this call since it has no contact with the customer, does not provide typical end-office services and does not provide dial tone for the call.
- US LEC serves only as an interexchange carrier between the wireless customer and the incumbent local exchange carrier.
- US LEC is not providing a service that facilitates the call in any manner since it still must flow from the calling party to the ILEC to ITC to the toll free customer.

US LEC is deleting information from the call that is important both to ITC as the toll free service provider and the toll free service customer.

In summary, to the best of ITC^DeltaCom's knowledge, US LEC entered into an unlawful arrangement with one or more wireless carriers whereby the wireless carriers route their originating 800 and 888 calls directly to US LEC. US LEC then strips the automatic number identification ("ANI") and calling party number ("CPN") information from all such calls in order to deceive ITC^DeltaCom as to the wireless origination of such calls.[1] US LEC then "re-originates" the calls as if the calls were being made by landline US LEC customers, and US LEC delivers the calls to ITC^DeltaCom for termination with the 800 or 888 subscribers. US

[1] ANI identifies the calling party's billing number. ANI capability enables the carrier to identify the originating number of a call, which when combined with the called number, reveals the jurisdictional nature of the call. *See, e.g., Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Service*, 4 FCC Rcd 1966, n.7 (1989); *Rules and Policies Regarding Calling Number Identification Service – Caller ID*, 9 FCC Rcd 1764, n.6 (1994); *see also* 47 C.F.R. § 64.1600(b) (defining ANI as "the delivery of the calling party's billing number by a local exchange carrier to any interconnecting carrier for billing or routing purposes, and to the subsequent delivery of such number to end users."). Calling Party Number ("CPN") "refers to the subscriber line number or the directory number contained in the calling party number parameter of the call set-up message associated with an interstate call on a Signaling System 7 network." 47 C.F.R. § 64.1600(c).

LEC then imposes an interstate access charge on ITC^DeltaCom that is substantially higher than the modest tandem fees that ITC^DeltaCom normally pays to the ILEC for such wireless calls.[2] It is ITC^DeltaCom's understanding that US LEC applies the default percent interstate usage ("PIU") factor of 50 percent interstate/50 percent intrastate. ITC^DeltaCom further understands that, pursuant to US LEC's contract with the wireless carrier, US LEC provides an economic incentive to the wireless carrier as a result of the access charge that it has imposed on ITC^DeltaCom.

Upon discovering these unlawful practices, ITC^DeltaCom contacted US LEC to obtain a credit for the unlawfully imposed interstate access charges, and to ensure that US LEC would immediately cease this practice. To date, ITC^DeltaCom has not received the relief it sought.

US LEC's practice of imposing interstate access charges on ITC^DeltaCom for wireless-originated calls after US LEC has stripped the ANI and CPN is a serious violation of Section 201(b) of the Communications Act. Section 201(b) requires that "[a]ll charges, practices, classifications . . . for communication service, shall be just and reasonable."[3] It is unjust and unreasonable in violation of this provision for US LEC to impose interstate access charges upon ITC^DeltaCom under the false pretense that the call has originated from a US LEC customer,[4] and for US LEC to deliberately strip the ANI and CPN from these calls for the purpose of deceiving ITC^DeltaCom as to the wireless origination of the calls. ITC^DeltaCom has not by contract or otherwise ever agreed to pay US LEC interstate access charges for 800 or 888 calls originating from wireless carriers.

It should be noted that the Commission previously has found that it is an unjust and unreasonable practice in violation of Section 201(b) for a carrier to charge an entity for a service that the entity neither ordered nor received.[5] In the present case, US LEC is providing illicitly the functional equivalent of a transit service that ITC^DeltaCom neither ordered nor consented to.

In addition, US LEC's practice is unlawful because its use of the default PIU factor for this traffic is a knowing misrepresentation of the jurisdictional nature of the 800 and 888 wireless-originated calls. Pursuant to the statute and Commission rules and policies, transmissions that use access service must be identified either as interstate or intrastate, and

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[2] Based on a traffic study that ITC^DeltaCom completed, it appears that the vast majority of the traffic (over eighty percent) upon which US LEC has assessed access charges is wireless-originated "800" or "888" traffic.

[3] 47 U.S.C. § 201(b).

[4] Similarly, the Commission previously has concluded that "LECs cannot assess charges on IXCs for the facilities used to connect the CMRS provider's network to that of the LEC because those facilities are not common lines for purposes of the access charge rules." *Texcom, Inc. d/b/a Answer Indiana v. Bell Atlantic Corp., d/b/a Verizon Communications*, Memorandum Opinion and Order, FCC 01-347, at ¶ 12 (Nov. 28, 2001).

[5] *See Capital Network Systems, Inc., Tariff F.C.C. No. 2*, Memorandum Opinion and Order, 6 FCC Rcd 5609, ¶ 4 (1991).

Commission precedent requires US LEC to charge for traffic based on the actual PIU.[6] By knowingly stripping the ANI and CPN from these calls and using the default PIU of 50 percent interstate/50 percent intrastate, US LEC has unlawfully modified and misrepresented the jurisdictional nature of some or all of the calls at issue.

US LEC's practices and billing of access charges to ITC^DeltaCom also violate the terms of its FCC-filed tariff and Section 203 of the Act. As one example, US LEC has imposed on ITC^DeltaCom per query charges for "800 Database Access Service." However, US LEC's tariff provides that the charges associated with the 800 Database Access Service apply only to those calls originated by US LEC's end users.[7] In the present situation, the end user is the wireless customer, not a US LEC end user, and therefore, US LEC is violating its tariff by imposing ITC^DeltaCom for query charges associated with 800 Database Access Service.

As another example, US LEC violates the terms of its tariff by billing ITC^DeltaCom for access charges. US LEC's tariff provides only two service options: (1) Direct End Office Access, which applies only to entities whose traffic is carried solely on US LEC facilities, and (2) Indirect Access, which applies only to those entities whose traffic originates and terminates with US LEC via the use of tandem switching facilities. Neither scenario applies in this case, and therefore, the charges are unlawful.[8]

As a third example, US LEC violates the terms of its tariff, Section 203 of the Act, and the Commission's rules by failing to transmit CPN and ANI to ITC^DeltaCom. Section 64.1601(a) of the Commission's rules requires common carriers using Signaling System 7 ("SS7") functionality, such as US LEC, to transmit the CPN associated with an interstate call,[9] and US LEC's tariff states that it will transmit such CPN.[10] Yet, in ITC^DeltaCom's experience, virtually all call records are devoid of CPN – the space for the CPN in the call record either is blank or populated with "0." US LEC similarly violates the terms of its tariff by failing to accurately transmit ANI.[11]

As a fourth example, US LEC violates the terms of its tariff and Section 203 of the Act by misrepresenting the jurisdictional nature of the traffic. Its tariff provides that "[w]here possible," US LEC would seek to bill usage according to an accurate determination of the jurisdictional nature of the traffic. In this case, US LEC has failed to adhere to that standard

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6 *See, e.g., Local Exchange Carriers' Revisions to Tariffs to Implement Section 36.154(a) of the Commission's Rules*, 5 FCC Rcd 3248 (1990) (citing *Switched Transport Expanded Interconnection Order*, 7 FCC Rcd at 7442-43, ¶ 137)).

7 US LEC Corp., Tariff F.C.C. No. 1, Access Services, at 42, § 2.5 (emphasis added) (provided as Attachment 1).

8 *See* Attachment 1.

9 47 C.F.R. § 64.1601(a).

10 *See* Attachment 1 at 35, § 2.1.1.

11 *See* Attachment 1.

by misrepresenting the jurisdictional nature of some or all of the traffic in an effort to deceive ITC^DeltaCom as to the wireless origination of the calls.

ITC^DeltaCom requests that US LEC immediately cease and desist from these unlawful practices. ITC^DeltaCom also requests that US LEC refund it for any and all access charges it has paid to US LEC for 800, 888 or other calls originated by wireless carriers. ITC^DeltaCom further requests that US LEC compensate it for any and all harms that it has suffered due to US LEC's conduct. Additionally, ITC^DeltaCom requests that the Commission take any and all actions necessary or appropriate to ensure that ITC^DeltaCom is not adversely affected by US LEC's conduct.

Sincerely,

Robert J. Aamoth
Jennifer M. Kashatus
Counsel for ITC^DeltaCom
Communications, Inc.

cc: Alexander Starr, Chief, Market Disputes Resolution Division
Christopher Olsen, Assistant Chief, Market Disputes Resolution Division
Tracy Bridgham, Special Counsel, Market Disputes Resolution Division
Marlene Dortsch, Secretary

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

NEWNAN DIVISION

ITC^DELTACOM COMMUNICATIONS, INC.,	:	
Plaintiff,	:	
v.	:	FILE NO. _____
US LEC CORP.; US LEC OF GEORGIA, INC.; US LEC OF ALABAMA, INC.; US LEC OF FLORIDA, INC.; US LEC OF TENNESSEE, INC. (d/b/a US LEC OF MISSISSIPPI); US LEC OF NORTH CAROLINA, INC.; US LEC OF LOUISIANA, INC; and US LEC OF TENNESSEE, INC.,	:	**JURY TRIAL DEMANDED**
Defendants.	:	

_____

COMPLAINT

NOW COMES Plaintiff ITC^DELTACOM COMMUNICATIONS, INC. and files this Complaint against Defendants US LEC CORP., US LEC OF GEORGIA, INC., US LEC OF ALABAMA, INC., US LEC OF FLORIDA, INC., US LEC OF TENNESSEE, INC. (d/b/a US LEC OF MISSISSIPPI), US LEC OF NORTH CAROLINA, INC., US LEC OF LOUISIANA, INC., and US LEC OF TENNESSEE, INC. and respectfully shows the Court:

INTRODUCTION

This action arises out of Defendants' intentional and knowing misrepresentations to ITC of the nature of certain calls placed to customers who purchase toll free service from ITC. Defendants have represented to ITC that a majority of the calls being sent to ITC were originated

by local landline customers of Defendant, when, in fact, the calls originated as wireless calls. As a direct result of this deceptive practice, Defendants have fraudulently billed ITC improper and unearned charges for these calls. Furthermore, Defendants went to great lengths to conceal from ITC the true wireless nature of these calls, and their fraudulent charges for them, by omitting from Defendants' bills to ITC certain call information required by industry standards. This action seeks damages for injuries ITC has suffered as a result of Defendants' fraudulent scheme and injunctive relief enjoining Defendants from engaging in such fraudulent and deceptive practices in the future.

PARTIES

1. ITC^DeltaCom Communications, Inc. ("ITC") is an Alabama corporation authorized to do business in the State of Georgia with its principal place of business at 1791 O.G. Skinner Drive, West Point, Georgia 31833. ITC provides local and long distance telephone services, including toll-free ("800" or "888" numbers) services, to customers primarily throughout the Southeastern United States.

2. Upon information and belief, US LEC Corp. is a North Carolina corporation with its principal place of business at 6801 Morrison Boulevard, Charlotte, North Carolina 28211.

3. Upon information and belief, US LEC of Georgia, Inc. is a Delaware corporation authorized to do business in Georgia. US LEC of Georgia's principal place of business is at 6801 Morrison Boulevard, Charlotte, North Carolina 28211.

4. Upon information and belief, US LEC of Alabama, Inc. is a North Carolina corporation with its principal place of business at 6801 Morrison Boulevard, Charlotte, North Carolina 28211.

5. Upon information and belief, US LEC of Florida, Inc. is a North Carolina corporation with its principal place of business at 6801 Morrison Boulevard, Charlotte, North Carolina 28211.

6. Upon information and belief, US LEC of North Carolina, Inc. is a Delaware corporation with its principal place of business at 6801 Morrison Boulevard, Charlotte, North Carolina 28211.

7. Upon information and belief, US LEC of Tennessee, Inc. is a Delaware corporation with its principal place of business at 6801 Morrison Boulevard, Charlotte, North Carolina 28211.

8. Upon information and belief, US LEC of Tennessee, Inc. (d/b/a US LEC of Mississippi) is a Delaware corporation with its principal place of business at 6801 Morrison Boulevard, Charlotte, North Carolina 28211.

9. Upon information and belief, US LEC of Louisiana, Inc. is a Delaware corporation with its principal place of business at 6801 Morrison Boulevard, Charlotte, North Carolina 28211.

JURISDICTION AND VENUE

10. This action is based upon violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* (hereinafter referred to as "RICO"), violations of the Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1, *et seq*. (hereinafter "Georgia RICO"), violations of the Georgia Deceptive Trade Practices Act, O.C.G.A. § 16-14-1, *et seq.*, and the common law of Georgia prohibiting fraud and arises out of

the intentional and fraudulent conduct engaged in by Defendants. This conduct has been a prominent part of a coordinated, common scheme by Defendants to manipulate, exploit and violate industry-wide practices and standards for the purpose of defrauding ITC and others and obtaining illicit financial gain.

11. This Court has jurisdiction over the federal RICO claim in this action and the action itself pursuant to 28 U.S.C. § 1331 and 18 U.S.C. § 1964, Racketeer Influenced and Corrupt Organizations Act. This Court has jurisdiction over the pendent claims based on Georgia law pursuant to 28 U.S.C. § 1367.

12. Venue is proper in this Court pursuant to 28 U.S.C. § 1391. This action arises out of the transaction of business and other activities by Defendants within this judicial district.

13. This Court has personal jurisdiction over US LEC Corp. ("US LEC") because this action arises out of the transaction of business, commission of tortious injury, and other activities by US LEC that have occurred and are occurring in the State of Georgia. Upon information and belief, US LEC and/or its agent(s), also regularly and systematically transacts business in the State of Georgia.

14. This Court has jurisdiction over US LEC of Georgia, Inc., US LEC of Alabama, Inc., US LEC of Florida, Inc., US LEC of Tennessee, Inc. (d/b/a US LEC of Mississippi), US LEC of North Carolina, Inc., US LEC of Louisiana, Inc., and US LEC of Tennessee, Inc. (collectively, the "RICO Defendants") as they have transacted substantial business with ITC in this judicial district.

FACTUAL ALLEGATIONS

15. ITC's customers include subscribers who purchase toll free telephone services. To reach one of ITC's toll free customers, the calling party originates the telephone call by dialing the toll free number. Where the calling party is served by a wireless carrier, the wireless carrier transfers or "hands-off" the call to the local exchange carrier ("LEC"), and the LEC assesses a charge on the wireless carrier. If the number dialed belongs to an ITC customer, the LEC then transports the call to ITC through use of a tandem switching facility. ITC pays for such transport to ITC's network. ITC then terminates the call to its toll free customer. Under such circumstances, the originating wireless carrier does not receive any payment from ITC.

16. Upon information and belief, beginning as early as August 2000, the RICO Defendants entered into arrangements with one or more wireless carriers whereby the wireless carriers agreed, in return for an economic incentive provided to the wireless carrier by the RICO Defendants, to route their originating toll free calls directly to the RICO Defendants, who would then represent themselves as the originating LECs for the calls, instead of routing such calls directly through a LEC (and a tandem) as per the industry practice.

17. Pursuant to this arrangement, the RICO Defendants, in contravention of industry practice and standards, removed, stripped or blocked the transmission to ITC of certain information transmitted by the wireless carriers, including the automatic number identification ("ANI") and calling party number ("CPN") information. The RICO Defendants took affirmative action to strip or block this information from all wireless-originated toll free calls in order to deceive ITC as to the true origination of such calls and to induce ITC to pay the RICO Defendants a charge for such calls. ANI identifies the calling party's billing number. ANI

capability enables the carrier to identify the originating number of a call which, when combined with the called number, discloses the jurisdictional nature of the call as interstate or intrastate. CPN refers to the subscriber line number or the directory number contained in the calling party number parameter of the call set-up message associated with an interstate call on a Signalling System 7 network as defined by industry standards and practice.

18. After removing or blocking the original ANI and CPN from the wireless-originated calls, the RICO Defendants then replace the proper ANI and CPN calling party information with information which makes the calls appear as if they were being made from a standard landline (or non-wireless) telephone number. Incoming calls to these "dummy" or fake landline subscriber numbers result in an automated message stating that the number "has been disconnected or is no longer in service." This message proves that these dummy or fake numbers were not in fact the numbers from which the toll free calls were originated.

19. After implementing this deceptive, alternative calling scheme, the RICO Defendants deliver the calls to ITC for termination with the toll free customers without disclosing to ITC that the ANI and CPN calling party information has been misrepresented. Based on these dummy or fake numbers, the RICO Defendants then impose access charges on ITC for delivering the wireless originated calls.

20. The vast majority of the calls upon which the RICO Defendants have imposed such access charges came from approximately twenty (20) telephone numbers. The RICO Defendants have identified these calls, for the purpose of billing ITC, as landline, not wireless calls. Upon information and belief, the majority of the calls to ITC's toll free customers from these identified telephone numbers were in fact originated by wireless subscribers.

21. Upon learning that an unusually high percentage of calls from US LEC to ITC's toll free customers were being originated from approximately twenty (20) landline telephone numbers, ITC requested detailed billing records from the RICO Defendants to verify the accuracy of their billings to ITC. In response to this request, the RICO Defendants delivered billing records to ITC in a format that does not conform to industry standards because the RICO Defendants had taken affirmative steps to delete the true originating, or "calling party", telephone number and the date and time of each call. The RICO Defendants took this action in order to mislead ITC and to conceal the true nature of the calls. As a result, ITC was unable to detect from these records the true "wireless" nature of the origination of these calls upon which the RICO Defendants assessed access charges against ITC.

22. The RICO Defendants further concealed the wireless nature of telephone calls on which they assessed access charges against ITC by using telephone numbers for billing purposes that appeared in the Local Exchange Rating Guide ("LERG") (a database used by all carriers in the telecommunications industry to, among other things, identify the telecom carrier responsible for a particular telephone number and the nature of the use of the telephone number) as the telephone numbers (i.e., landline numbers) of a competitive local exchange carrier, or "CLEC", specifically assigned to the RICO Defendants, rather than telephone numbers assigned to wireless carriers.

23. Upon information and belief, the RICO Defendants have made similar misrepresentations concerning the calling party ANI, CPN, and other information regarding wireless calls placed to subscribers of toll free service of other telecommunications companies in addition to ITC. Upon information and belief, the RICO Defendants have also wrongfully and

fraudulently billed other telecommunication companies for access charges on wireless-originated calls to toll free numbers.

24. Upon information and belief, the RICO Defendants have entered into arrangements with wireless carriers whereby the RICO Defendants provide a refund, kickback, or otherwise share with the wireless carrier some portion of the unlawful access charge that it has imposed on ITC and other providers of toll free telephone services through these deceptive practices. Upon information and belief, the RICO Defendants have entered into arrangements with wireless carriers whereby the wireless carriers send toll-free calling traffic originating on the wireless carriers' networks to the RICO Defendants for call completion, so that the RICO Defendants can utilize the deceptive, alternative calling scheme described above and share the revenues derived from such scheme with the wireless carriers.

25. As a result of these deceptive and unlawful practices and arrangements, the RICO Defendants are able to offer services to wireless carriers at predatory prices which are below cost, creating unfair competition in the telecommunications marketplace.

26. It is unjust and unreasonable for the RICO Defendants to impose access charges upon ITC under the false pretense that the call has originated from the RICO Defendants' landline customer, and for the RICO Defendants to deliberately strip or block the calling party ANI and CPN information from these calls for the purpose of deceiving ITC as to the wireless origination of the calls.

27. The RICO Defendants' practice of concealing the true ANI for these calls has also harmed ITC's toll free customers by obstructing their access to caller identification information that is used in many business applications. Moreover, this fraudulent concealment of ANI

information has the effect of degrading the utility of ITC's toll free service, making it a less attractive product to ITC's customers and resulting in a competitive disadvantage for ITC.

28. ITC has not by contract or otherwise ever agreed to pay the RICO Defendants any access charges for toll free calls originating from wireless carriers. Had ITC known of the true nature of these calls, it would not have paid the access charge which the RICO Defendants charged for such calls.

29. Pursuant to industry standards and practices, all telephone transmissions that use access service must be identified either as interstate or intrastate. The RICO Defendants are required to charge for such transmissions based on the actual percentage of interstate usage ("PIU"). The RICO Defendants do not charge ITC for access service based on the actual PIU, but rather they apply a default PIU factor of 50 percent interstate and 50 percent intrastate. By knowingly stripping or blocking the calling party ANI and CPN information from these calls and using a default PIU, the RICO Defendants have unlawfully modified and misrepresented the jurisdictional nature of some or all of the wireless calls made to ITC's toll free subscribers.

30. The RICO Defendants' fraudulent misrepresentations regarding the ANI and CPN for wireless toll free calls and fraudulent billing of access charges for such calls to ITC is illustrated by the fact that these activities violate the express terms of their interstate and intrastate tariffs, including the following:

a. The RICO Defendants' tariffs provide that the charges associated with "800 Database Access Service" apply only to those calls originated by the RICO Defendants' end users, not where the call was in fact originated by a customer of a wireless carrier. Therefore, the RICO Defendants

fraudulently misrepresented the true nature of these calls and fraudulently charged ITC by imposing on ITC charges associated with 800 Database Access Service when the calls actually originated from customers of wireless carriers.

b. The RICO Defendants' tariffs provide for access charges on only two service options: (1) Direct End Office Access, which applies only to entities whose telephone traffic is carried solely on the RICO Defendants' facilities, and (2) Indirect Access, which applies only to those entities whose traffic originates and terminates with the RICO Defendants via the use of tandem switching facilities. The RICO Defendants' practice of imposing access charges for wireless-originated toll free calls does not fall into either of these service options. In fact, the RICO Defendants alternative calling scheme is designed to conceal the true wireless nature of these calls. Therefore, the RICO Defendants fraudulently misrepresented the true nature of these calls and fraudulently charged ITC by billing ITC for them.

c. The RICO Defendants fraudulently misrepresented the true nature of these calls and fraudulently charged ITC for them by failing to accurately transmit to ITC the ANI of wireless-originated calls placed to ITC's toll free customers.

31. The RICO Defendants also violate the terms of their tariffs and industry standards and practices by failing to transmit the true CPN to ITC. Such standards and practices require

common carriers using Signalling System 7 ("SS7") functionality, such as the RICO Defendants, to transmit the CPN associated with a call. By concealing the CPN regarding toll free calls originating from customers of wireless carriers, the RICO Defendants fraudulently misrepresented the true nature of these calls and fraudulently charged ITC for them.

COUNT ONE

VIOLATION OF RICO, 18 U.S.C. § 1962

32. ITC realleges and incorporates by reference each allegation contained in Paragraphs 1 through 31 of this Complaint as if fully set forth herein.

33. ITC is a "person" within the meaning of 18 U.S.C. § 1964(c).

34. At all times relevant hereto, ITC and Defendants were and are "persons" within the meaning of 18 U.S.C. § 1961(3).

The RICO Enterprise

35. Collectively, Defendants constitute an "enterprise" within the meaning of 18 U.S.C. § 1961(4), referred to hereafter as the "RICO Enterprise."

36. The RICO Enterprise is an ongoing organization, which engages in, and whose activities affect, interstate commerce.

37. While US LEC participates in the RICO Enterprise and is a part of it, US LEC also has an existence separate and distinct from the RICO Enterprise. The RICO Enterprise and the pattern of racketeering activity described below are separate and distinct in that the pattern of racketeering activity carried out by the RICO Defendants is only a portion of the overall

activities of the RICO Enterprise. By engaging in the unlawful activities set forth in this Complaint, Defendants have diverged from their regular business practices and engaged in this fraudulent and deceptive conduct.

38. As the parent company of the RICO Defendants, US LEC maintains an interest in and control of the RICO Enterprise and also conducts or participates in the conduct of the RICO Enterprise's affairs through a pattern of racketeering activity.

39. In order to successfully carry out the fraudulent alternative calling scheme and to deceive and defraud ITC in the manner set forth in this Complaint, US LEC had to have a system and structure in place which allows US LEC to manipulate and control the RICO Defendants, who provide services to ITC, and to manipulate and control their billing of toll free access charges and their transmissions of calling party information to ITC. The RICO Enterprise provides US LEC the ability to carry out and conceal this unlawful scheme.

40. As the parent company to the RICO Defendants, US LEC directed and coordinated the RICO Enterprise, instructing each RICO Defendant to participate in the deceptive alternative calling scheme and to engage in the fraudulent billing of access charges to ITC for the misrepresented wireless calls.

41. US LEC's control of and participation in the RICO Enterprise is necessary for the successful operation of Defendants' fraudulent scheme.

42. With respect to the activities alleged herein, each Defendant, in committing those activities, participated and agreed to a scheme to violate 18 U.S.C. § 1962(a) and (c). Each Defendant also agreed to the operation of the scheme or artifice to defraud and deprive ITC of

money and other property interests. In furtherance of these agreements, each Defendant also agreed to interfere with, obstruct, delay or affect commerce by attempting to obtain and/or actually obtaining property interests to which Defendants are not entitled.

RICO Predicate Acts

43. The numerous predicate acts of mail and wire fraud described herein are part of the fraudulent schemes instituted by Defendants that were designed to defraud ITC of its money and property interests under false pretenses. As the victim of these unlawful patterns of illegal activity ITC has and continues to suffer losses as a result of these unlawful activities.

44. In carrying out the fraudulent and deceptive scheme described above, Defendants have engaged in, *inter alia*, conduct in violation of federal laws, including 18 U.S.C. §§ 1341 and 1343, and 18 U.S.C. § 1961 *et seq.*

45. For the purpose of executing and/or attempting to execute their scheme to defraud ITC and to obtain money by means of false pretenses, representations or promises, Defendants, in violation of 18 U.S.C. § 1341, placed in the U.S. mail, post offices, and/or in authorized repositories for mail matter, things to be sent or delivered by the U.S. Postal Service, and ITC received matter and things therefrom including but not limited to reports, data, summaries, billing statements, invoices and other information.

46. For the purpose of executing and/or attempting to execute their scheme to defraud and to obtain money by means of deceptive practices and misrepresentations, Defendants, in violation of 18 U.S.C. § 1343, transmitted and received across state lines by wire matter and

things therefrom, including but not limited to reports, data, summaries, statements, faxes, numbers, false calling party ANI and CPN information, and other information.

47. In those matters and things sent or delivered by the U.S. Postal Service, by wire and through other interstate electronic media, Defendants falsely and fraudulently misrepresented and fraudulently suppressed material facts from ITC as described above, in violation of 18 U.S.C. §§ 1341 and 1343, including but not limited to the following:

a. Upon information and belief, on a daily basis beginning at least as early as August 2000, Defendants have transmitted electronic information by interstate wire that concealed and failed to disclose to ITC the authentic CPN information from wireless-originated calls placed to ITC's customers' toll free numbers. Upon information and belief, these wire transmissions were made from Defendants' place of business in Charlotte, North Carolina, among other places, to ITC's offices in West Point, Georgia.

b. Upon information and belief, on a daily basis beginning at least as early as August 2000, Defendants have transmitted electronic information by interstate wire that concealed and failed to disclose to ITC the authentic ANI information from wireless-originated calls placed to ITC's customers' toll free numbers. Upon information and belief, these wire transmissions were made from Defendants' place of business in Charlotte, North Carolina, among other places, to ITC's offices in West Point, Georgia.

c. Upon information and belief, on a daily basis beginning at least as early as August 2000, Defendants have transmitted electronic information by interstate wire that misrepresented to ITC the ANI information from wireless-originated calls placed to ITC's customers' toll free numbers. Upon information and belief, these wire transmissions were made from Defendants' place of business in Charlotte, North Carolina, among other places, to ITC's offices in West Point, Georgia.

d. Upon information and belief, on a daily basis beginning at least as early as August 2000, Defendants have transmitted electronic information by interstate wire that misrepresented to ITC the CPN information from wireless-originated calls placed to ITC's customers' toll free numbers. Upon information and belief, these wire transmissions were made from Defendants' place of business in Charlotte, North Carolina, among other places, to ITC's offices in West Point, Georgia.

e. Upon information and belief, on a daily basis beginning at least as early as August 2000, Defendants have transmitted electronic information by interstate wire that misrepresented to ITC the jurisdictional nature of wireless-originated calls placed to ITC's customers' toll free numbers. Upon information and belief, these wire transmissions were made from Defendants' place of business in Charlotte, North Carolina, among other places, to ITC's offices in West Point, Georgia.

f. Upon information and belief, on a daily basis at least as early as approximately August 2000, Defendants have transmitted electronic information by interstate wire that misrepresented the percentage of interstate usage from wireless-originated calls placed to ITC's customers' toll free numbers. Upon information and belief, these wire transmissions were made from Defendants' place of business in Charlotte, North Carolina, among other places, to ITC's offices in West Point, Georgia.

g. Upon information and belief, at least as early as August 2000, Defendants have mailed ITC invoices each month that misrepresented the jurisdictional nature of wireless-originated calls placed to ITC's customers' toll free numbers. Upon information and belief, these mailings were made from Defendants' place of business in Charlotte, North Carolina, among other places, to ITC's offices in West Point, Georgia.

h. Upon information and belief, beginning in approximately August 2000, Defendants delivered billing records to ITC which misrepresented or omitted the true originating, or calling party, telephone number and date and time of each call. Upon information and belief, these mailings were made from Defendants' place of business in Charlotte, North Carolina, among other places, to ITC's offices in West Point, Georgia.

i. Upon information and belief, beginning in approximately August 2000, Defendants have mailed ITC invoices each month that misrepresented the percentage of interstate usage from wireless-originated calls placed to

ITC's customers' toll free numbers. Upon information and belief, these mailings were made from Defendants' place of business in Charlotte, North Carolina, among other places, to ITC's offices in West Point, Georgia.

48. Defendants intentionally and knowingly made these material misrepresentations and intentionally and knowingly suppressed material facts from ITC for the purpose of deceiving and defrauding ITC and thereby obtaining financial gain.

49. Defendants either knew, or recklessly disregarded, that the misrepresentations and omissions described above were material. As a result of Defendants' misrepresentations and omissions, ITC was unable to discover the true jurisdictional nature and other material information of the wireless calls for which the RICO Defendants had improperly billed ITC.

50. ITC necessarily and justifiably relied on the misrepresentations and omissions made by Defendants and paid funds to Defendants in reliance on them. Absent Defendants' fraudulent scheme, misrepresentations and omissions, ITC would not have paid Defendants any charges for the wireless calls at issue.

51. ITC has therefore been defrauded, deceived and injured in its business or property by Defendants' misrepresentations, omissions and racketeering activities.

Pattern of Racketeering Activity

52. As set forth above, Defendants have engaged in a "pattern of racketeering activity," as defined in 18 U.S.C. § 1961(5), by participating in a fraudulent scheme consisting of at least two such acts of racketeering activity, as described above, within the past ten years. In

fact, each Defendant has committed at least thousands of acts of racketeering activity, because the transmission of false information, or concealment of information, for each wireless-originated toll free call is a separate act. Each such act of racketeering activity was related, had similar purposes, involved the same or similar participants and methods of commission, and had similar results impacting upon similar victims, including ITC.

53. The multiple acts of racketeering activity committed by Defendants, as described above, were related to each other. These acts amount to, and pose a threat of, continued racketeering activity, and, therefore, constitute a "pattern of racketeering activity," as defined in 18 U.S.C. § 1961(5).

54. Through the patterns of racketeering outlined above, Defendants have received income which they in turn have used to acquire an interest in, establish and/or operated the RICO Enterprise, all in violation of 18 U.S.C. § 1962(a).

55. Through the patterns of racketeering activities outlined above, Defendants have also conducted and participated in the affairs of the RICO Enterprise, in violation of 18 U.S.C. § 1962(c).

56. With respect to their violations of 18 U.S.C. §§ 1962(a) and (c), Defendants have acted at all times with malice toward ITC.

57. ITC has been injured in its business and property as a result of the RICO Defendants' violations of 18 U.S.C. § 1962(a) and (c).

58. The injuries to ITC directly resulting from the RICO Defendants' violation of the RICO statute and associated predicate acts include monies paid to Defendants, lost business, lost profits and increased administrative and other costs.

59. ITC is therefore entitled to recover threefold the damages it has sustained, and the costs of this suit, including reasonable attorneys' fees.

COUNT TWO

VIOLATION OF GEORGIA RICO, O.C.G.A § 16-14-1, *et seq*.

60. ITC realleges and incorporates by reference each allegation contained in Paragraphs 1 through 59 of this Complaint.

61. The RICO Enterprise described above in paragraphs 35 to 42 constitutes an "enterprise" within the meaning of O.C.G.A § 16-14-3(6).

62. In carrying out the fraudulent scheme described above, Defendants have engaged in numerous predicate acts of racketeering under O.C.G.A § 16-14-3(9), including violations of 18 U.S.C. §§ 1341 (mail fraud) and 1343 (wire fraud), as set forth in paragraphs 43 through 51 above.

63. In carrying out the fraudulent scheme described above, Defendants have also committed theft by deception in violation of O.C.G.A. § 16-8-3, a predicate act of racketeering under O.C.G.A § 16-14-3(9)(A), by intentionally engaging in the following conduct in order to wrongfully obtain money and other valuable property from ITC:

a. Obtaining payment from ITC for invoices which were deceptive and misleading;

b. Creating false impressions regarding the jurisdictional nature of wireless-originated calls placed to ITC's toll free customers;

c. Preventing ITC from acquiring accurate information concerning the jurisdictional nature of wireless-originated calls placed to ITC's toll free customers; and/or

d. Delivering billing records to ITC which misrepresented or omitted the true originating, or calling party, telephone number and date, time and duration of each call.

64. Defendants have deprived ITC of substantial property and/or funds as a direct and proximate result of these deceptive acts.

65. As set forth above, Defendants have engaged in a "pattern of racketeering activity," as defined in O.C.G.A. § 16-14-3(8)(A), by committing at least two acts of racketeering activity, as described above, within the past four years. In fact, each Defendant has committed at least thousands of acts of racketeering activity, because the transmission of false information, or concealment of information, for each wireless-originated toll free call is a separate act. Each such act of racketeering activity had similar intents, purposes, and involved the same or similar participants and methods of commission, and had similar results impacting upon similar victims, including ITC.

66. Through the patterns of racketeering described above, Defendants have received income from ITC which they in turn have used to acquire an interest in, establish and/or operate the RICO Enterprise, all in violation of O.C.G.A. § 16-14-4(a).

67. Through the patterns of racketeering activities described above, Defendants have also conducted and participated directly or indirectly in the affairs of the RICO Enterprise, in violation of O.C.G.A. § 16-14-4(b).

68. The injuries to ITC directly resulting from the RICO Defendants' violation of the Georgia RICO statute and associated predicate acts include monies paid to Defendants, lost business, lost profits and increased administrative and other costs.

69. ITC is therefore entitled to recover threefold the damages it has sustained, and the costs of this suit, including reasonable attorneys' fees.

COUNT THREE

VIOLATION OF GEORGIA DECEPTIVE TRADE PRACTICES ACT, O.C.G.A. § 10-1-372

70. ITC realleges and incorporates by reference each allegation contained in Paragraphs 1 through 69 of this Complaint.

71. The fraudulent and deceptive scheme described above and carried out by Defendants constitutes multiple deceptive trade practices under O.C.G.A. § 10-1-372.

72. Among other fraudulent and deceptive practices, Defendants have engaged in the following conduct which has created a likelihood of confusion or misunderstanding:

a. Caused a likelihood of confusion or of misunderstanding as to the source of wireless-originated calls placed to toll free customers.

b. Used deceptive representations and/or designations of geographic origin of wireless-originated calls placed to toll free customers.

c. Represented that wireless-originated calls placed to toll free customers have characteristics that they do not have.

d. Represented that wireless-originated calls placed to toll free customers are of a particular standard or grade when in fact they are of another.

73. Defendants have willfully engaged in these deceptive trade practices and at all times knew their actions to be deceptive in order to wrongfully obtain money and other valuable property from ITC.

74. As a direct and proximate result of Defendants' unfair and deceptive trade practices, ITC has been injured and will be damaged and irreparably harmed in the future if Defendants continue their deceptive practices.

75. If Defendants' unfair and deceptive trade practices are not enjoined, there exists a substantial likelihood that Defendants will repeat these acts and that ITC will suffer additional harm in the near future.

COUNT FOUR

COMMON LAW FRAUD

76. ITC realleges and incorporates by reference each allegation contained in Paragraphs 1 through 75 of this Complaint.

77. As described above, Defendants have repeatedly misrepresented in both written and electronic communications to ITC material information about wireless-originated calls, including the true originating, or calling party, telephone number and date and time of each call. Defendants have also made false statements concerning the jurisdictional nature of wireless-originated calls to toll free numbers.

78. Defendants' misrepresentations and omissions were material to ITC's decision to pay the monthly invoice charges the RICO Defendants sent to ITC for charges associated with these wireless-originated toll free calls which falsely described these calls as originating from landline subscribers of the RICO Defendants.

79. Without the above-described misrepresentations and fraudulent concealments of material facts by Defendants, ITC would not have paid the monthly invoice charges sent to ITC for access charges associated with these wireless-originated toll free calls.

80. Defendants knew that that their representations were false and that they were concealing material facts which ITC was entitled to know.

81. Defendants made their false representations and omitted or concealed material facts with the intent that ITC rely upon them and to induce ITC to pay charges to the RICO Defendants that it would not have otherwise paid.

82. ITC reasonably and justifiably relied on Defendants' false representations.

83. As a direct and proximate result of ITC's reliance on Defendants' misrepresentations and omissions, ITC has suffered and continues to suffer damages in an amount to be proved at trial plus interest.

84. As a direct and proximate result of Defendants' intentional and willful fraudulent conduct, ITC is entitled to punitive damages.

85. If Defendants' fraudulent conduct is not enjoined, there exists a substantial likelihood that Defendants will continue to defraud ITC and that ITC will suffer additional harm in the near future.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff ITC^DeltaCom Communications, Inc. respectfully prays for the following relief:

a. That this Court enter judgment in its favor against Defendants for three times the amount of damages to which it is found to be entitled, plus costs, interest, prejudgment interest, and reasonable attorneys' fees;
b. That this Court award punitive damages for Defendants' intentional and willful fraud;
c. That this Court order Defendants to immediately cease and desist from the unlawful and fraudulent practices described in this Complaint;

d. That this Court enjoin Defendants from engaging in their unfair and deceptive trade practices;

e. That ITC recover all costs of this litigation, including its attorneys' fees;

f. That a trial by jury be had on all issues; and

g. That ITC be granted such further relief as the Court deems proper.

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ITC^DELTACOM COMMUNICATIONS, INC.

CERTIFICATE OF SERVICE

I, Ross Dino, do hereby certify on this 18th day of October, 2002, that I have caused the foregoing **COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be filed via the FCC's Electronic Comment Filing System, with one copy served via e-mail on the following persons/entity:

Tamara Preiss
Pricing Policy Division
Wireline Competition Bureau
tpreiss@fcc.gov

Barry Ohlson
Policy Division
Wireless Telecommunications Bureau
bohlson@fcc.gov

Qualex International
qualexint@aol.com

/s/ Ross Dino
Ross Dino

(CC0192b.doc)